United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-2173

Docket No.
76-2173

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ARTHUR DRAYTON,

Petitioner-Appellee,

-against-

THE PEOPLE OF THE STATE OF NEW YORK, EUGENE GOLD, District Attorney, LOUIS J. LEFKOWITZ, Attorney General, State of New York, DEPARTMENT OF CORRECTIONS OF THE CITY OF NEW YORK, and BENJAMIN MALCOLM, Commissioner, and ARTHUR RUBIN, Warden of Riker's Island,

Respondents-Appellants.

B/S

APPELLANT'S BRIEF

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SHORT TITLE: Arthur Drayton v. People of State of NY, et al.

DOCKET NO. ▶ 76-2173

MR NUMBER ▶ T-6854

TYPE OF CASE: ☐ U.S. Civil ☐ Bankruptcy ☐ Criminal ☐ Original proc. ☒ Administrative ☐ Private Civil ☒ Prisoner

DISTRICT COURT: ☐ Conn. ☒ EDNY ☐ WDNY ☐ NDNY ☐ SDNY ☐ VT ☐ Other (specify)

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	SO 1 DATE ISSUED	Adj SO 2 DATE ISSUED	Adj SO 3 DATE ISSUED	Adj SO 4 DATE ISSUED	Adj SO 5 DATE ISSUED
	12-23-76	1-7-77			
Transcript	1-10-77	1-24-77			
Appellant's Brief	2-1-77	2-14-77			
Appellee's Brief	2-22-77	3-14-77			
Argument (Week of)	3-7-77	3-28-77			

☐ ADJ. SO, 6 ETC. OVER ☐ APPELLEE'S APPENDIX

FILING OF BRIEF, APPENDIX, ETC.

PAPER FILED	PARTY	DATE
B	T	2-14-77
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MOTIONS TO EXTEND TIME

	Date Filed	Order Entered
1	1-5-77	1-7-77
2		
3		
4		
5		
6		
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Proceedings Held in Abeyance ☐ Reactivated ☐

Issuance of Mandate Stayed ☐ Stay Vacated ☐

CALENDAR

Date Time Request Sent: 12-23-76

Date Disqualification Sent: 2-23-77

Date Certain Notices Sent (No. sent 6): 1 2 3 4 5 6 3 4

Receipt of Day Certain Notices 1 2 3 4 5 6 ☐

Date Set for Argument: 3-29-77

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TERMINATION

Date Heard/Submitted: 3-29-77 Tape No.: No Tape

Date Judgment Filed/~~Order of Disposition~~: 5-24-77 Date Mandate Issued: 7-6-77

Date Bill of Costs Filed:

Date Statement of Costs Filed:

Petition for Rehearing Filed Date 6-6-77 Granted ☐ Denied ☒ Date 6-29-77

☐ Additional Petitions for Rehearing-See Docket Entries

Petition for Certiorari Filed Date: Granted ☐ Denied ☐ Date:

☐ Additional Petitions for Certiorari-See Docket Entries

METHOD OF DISPOSITION

☒ WRITTEN OPINION (BY JUDGE)
☐ WRITTEN OPINION (PER CURIAM)
☐ DECISION FROM THE BENCH
☐ SUMMARY ORDER
☐ COURT ORDER W/O OPINION
☐ DEFAULT DISMISSAL (CAMP, CAEP, OTHER)
☐ CONSENT DISMISSAL (RULE 33, CRIMINAL, OTHER)
☐ 0.18(7) DISMISSAL
☐ OTHER (SPECIFY)

Record Returned: 7/13/77

Receipt of Return of Records:

Date Reopened:

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II. TABLE OF CASES, STATUTES AND AUTHORITIES.

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STATUTES INVOLVED

New York Criminal Procedure Law

Section 720.10 (1) - "'Youth' means a person charged with a crime alleged to have been committed when he was at least sixteen years old and less than nineteen years old."

Section 720.10 (2) - "'Eligible Youth' means a youth who is eligible to be found a youthful offender. Every youth is so eligible unless he (a) is indicted for a class A felony, or (b) has previously been convicted of a felony."

CPL Section 720.20:

"1. Upon conviction of an eligible youth, the court must order a presentence investigation of the defendant. After receipt of a written report of the investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender. Such determination shall be in accordance with the following criteria:

"(a) If in the opinion of the court the interest of justice would be served by relieving the eligible youth from the onus of a criminal record and by not imposing an indeterminate term of imprisonment of more than four years, the court may, in its discretion, find the eligible youth is a youthful offender; and

(b) Where the conviction is had in a local criminal court and the eligible youth has not prior to commencement of trial***been convicted of a crime or found a youthful offender, the court must find he is a youthful offender.

ISSUE PRESENTED

Whether New York may under the Equal Protection Clause of the Fourteenth Amendment provide that eligible youths charged with felonies in "superior courts" receive youthful offender treatment in the discretion of the court, while those charged with lesser crimes in "local criminal courts" receive such treatment automatically?

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

This is an appeal from an order of the District Court for the Eastern District of New York, entered December 1, 1976, which granted Arthur Drayton's application for a writ of habeas corpus (150-170).* In reaching this disposition the district court (Edward R. Neaher, J.) held that statute under which Drayton was sentenced, New York Criminal Procedure Law § 720.20 (1) (a), L. 1971, c. 981, § 1, unconstitutional under the Equal Protection Clause of the Fourteenth Amendment (150-170). The District Attorney of Kings County appeals from that order, seeking a direction to the district court to vacate it, and a decision upholding the constitutionality of the statute.

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* The numbers in parentheses refer to page numbers in the Appendix filed with this brief.

B. STATEMENT OF FACTS

Arthur Drayton and another, who is not a party to this action, was accused by Kings County Indictment 8218 of 1972 of: Attempted Robbery in the Second Degree (two counts) and Assault in the Second Degree (30,32). All the charges arose out of an incident which occurred on August 18, 1972 (30,32). All counts charged were class "D" felonies, punishable by a term of imprisonment not to exceed seven years, N.Y. Penal Law Sections 110.00/160.10, 110.05 (3), 120.05, 70.00 (2) (d).

On May 15, 1973, the defendant entered a plea of guilty to Assault in the Third Degree, a class "A" misdemeanor, in satisfaction of the indictment (7), N.Y. Penal Law § 120.00. When recommending that the plea be accepted, the Assistant District Attorney opined that after interviewing the complaining witnesses she had determined Attempted Robbery in the Second Degree to be an improper "disposition" of the case (8). Further, she characterized the incident as "...an assault in the Third Degree at the most" (8).

At no time during the taking of the plea did the defense counsel request to withdraw the guilty plea, in light of the remark passed by the Assistant District

Attorney, and seek to have the charges in the indictment reduced. Nor did the Assistant District Attorney make any such motion. Nor did the court reduce the charges in the indictment on its own motion -- distinct, that is, from accepting the plea of guilty to dispose of the indictment (8,5-23).

The court explained to Drayton that as a result of his plea he might receive a sentence of one year in prison, through lesser punishment as a youthful offender was a possibility. The court further explained that it would make no promise concerning the sentence to be given because it had not yet studied the probation report (12). Then Drayton acknowledged assaulting a person named Wilfredo Fisher on August 18, 1972 (15).

At sentencing, on August 27, 1973 (24), following the requests by the defendant's mother and his attorney that Drayton be given probation (25-27), the court observed that this incident was far from Drayton's first brush with the law (27). Drayton had twice appeared in Juvenile Court: the first, for demanding money from a fifteen year-old boy; the second, for stealing soda (27). This second charge led to Drayton's being placed on probation (27). In high school Drayton was a truant; he had neglected his studies, and his grades had deteriorated (28). While

associating with an unsavory group, Drayton had begun experimenting with heroin (28). In stages he had progressed to mainlining the drug, though he appeared no longer to be using it at the time he was sentenced in this case (28). Further, the court noted that Drayton had profited little from the fine example his parents had set for him (27-28).

In light of the defendant's background and personal history, the court denied Drayton youthful offender treatment, and sentenced him to one year in prison (28).

The defendant did not appeal his sentence or his conviction (34). But on October of 1973, he brought a motion to set aside his sentence on the ground that the statute under which he was sentenced violated the equal protection clause of the Fourteenth Amendment (34,3N). This motion was denied by the sentencing judge in a decision dated November 27, 1973 (34). The Appellate Division permitted Dratyon to appeal the denial of that motion (34, 3N). Later, it granted him permission to file late an appeal from his conviction, and he did so (34).

The Appellate Division, Second Department, on April 28, 1975, unamiously affirmed the lower court's two orders, four justices concurring in a memorandum

opinion, and one justice concurring specially. 47 A.D. 2d 952, (2d Dept. 1975). Next, the defendant moved for reargument and reconsideration of the appellate court's decision (34,3N). That motion was denied in an order dated May 30, 1975 (34,3N).

However, on June 9, 1975 Drayton obtained permission to appeal to the New York Court of Appeals (3N). That court also unamiously rejected his claim and affirmed his sentence, 39 N.Y. 2d 580 (1976). A motion for reargument was made and denied (3N).

On September 16, 1976 Drayton petitioned the District Court for the Eastern District of New York for a writ of habeas corpus (1,2-3-0). On September 24, 1976 the parties argued Drayton's claim in the district court (1,88-150). No evidentiary hearing was held (88-150).

On December 1, 1976, Judge Neaher granted the application for the writ, ordered Drayton released, and directed the state to seal all records concerning Drayton's indictment and conviction (1,151-170). The next day the judgment was entered; on December 14, 1976 the District Attorney of Kings County filed a notice of appeal (1).

ARGUMENT

THE STATUTORY SCHEME UNDER WHICH DRAYTON WAS SENTENCED CONFORMS TO THE FOURTEENTH AMENDMENT'S REQUIREMENTS BECAUSE ITS CLASSIFICATIONS ARE REASONABLE.

New York law requires* youthful offender treatment for an eligible youth, not previously convicted of a crime or adjudicated a youthful offender, who is convicted in a local criminal court. CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1. Eligible youths, as defined in CPL Section 720.10 (1) and (2), L. 1971, C. 981, Section 1, who are entitled automatically to youthful offender treatment under Section 720.20 (1) (b), L. 1971, c. 981, Section 1, may not be sentenced to a term of imprisonment in excess of six months. CPL Section 720.25, L. 1971, c. 981, Section 1. Local criminal courts may try only misdemeanors and petty offenses; they lack the authority to try felonies. CPL Section 10.30 (1) and 10.20 (1) (a). Thus, the legislature in drafting CPL Section 720.20 (1) (b), L. 1971,c. 981, Section 1, assured that the class

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* Much of the law which controlled the sentencing of youthful offenders at the time of Drayton's crime, August 18, 1972, has since been amended or superseded. Often the modified legislation carries the same section number within the New York Criminal Procedure Law (hereafter: CPL). Where such is the case, the citation to the statute by section in the CPL is accompanied by the relevant citation to the session laws. Where the statute which governed Drayton's case is still in force the only citation given is by section in the CPL. In either event the law controlling youthful offender adjudications at the time of Drayton's crime continues to govern his case, since the subsequent legislative changes in this area have been prospective only in their application: consequently, statutes of both sorts will be discussed in this brief in the present tense.

of eligible youths automatically to be accorded youthful offender treatment and six months maximum sentences would contain no one accused of any crime more serious than a misdemeanor.

In all other situations the decision whether or not to accord the eligible youth treatment as a youthful offender is left to the trial court's discretion. CPL Section 720.20 (1) (a), L. 1971, c. 981, Section 1. [These situations chiefly involve: eligible youths who are indicted for a felony; and eligible youths, accused of a misdemeanor or petty offense, who have been in the past either convicted of some crime not a felony, or adjudicated a youthful offender. CPL Sections 720.10 (1) and (2), 720.10 (1), L. 1971, c. 981 Section 1, and CPL Sections 10.20 (1) (a) and 10.30 (1).] Such youths, if accorded youthful offender treatment, are to be sentenced in the manner authorized of the criminal act for which the youthful offender finding was made, with the provision that indeterminate sentences of imprisonment cannot be imposed. CPL Sections 720.25 (a), L. 1971, c. 981, Section 1. [Since felonies, generally, are punishable in New York by the imposition of indeterminate sentences, N.Y. Penal Law Section 70.00 (1), the result of the statutory scheme is to provide the youthful offenders convicted of a felony receive a definite prison sentence of one

year or less under Penal Law Section 70.05 (1), or indefinite reformatory sentences with maximum limits of three or four years under Penal Law Sections 75.10 (1), L. 1965, c. 1030, and 75.20 (4), L. 1965, c. 1030. See R. Denzer, "Practice Commentary," to CPL Section 720.25 L. 1971, c. 981, Section 1, McKinney's Consolidated Laws of New York Annotated, Book 11A, pps. 323-325.)

Eligible youths who meet the requirements of CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, and for whom youthful offender treatment is mandatory upon conviction, are not entitled to a jury trial. CPL Section 340.40 (7). Rather they are tried before a single judge, CPL Section 340.40 (7). The maximum sentence of incarceration they may receive in six months. CPL Section 720.25 (b) (ii), L. 1971, c.981, Section 1. Whether a youth meets the requirements of CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, can, of course, be determined prior to trial.

On the other hand, eligible youths who fall within the class defined by CPL Section 720.20 (1) (a), L. 1971, c. 981, Section 1, for whom youthful offender treatment after conviction is a decision left to the court's discretion, are under no such constraint. When

they are charged with a crime for which the legislature has authorized as punishment incarceration which may exceed six months, they must be accorded a jury trial. Baldwin v. New York, 399, U.S. 66 (1970). It is a long standing policy of New York's to avoid burdening its courts with the necessity of jury trials for non-criminal youthful offender adjudications. New York State Legislative Annual 1971, c.981, p. 242. See CPL Section 720.35.

This, at any rate, is a brief sketch of the statutory scheme under which Drayton was sentenced. The way his case fit within it was this:

Arthur Drayton was accused by the Kings County grand jury of two counts of Attempted Robbery in the Second Degree, and one count of Assault in the Second Degree, all of which are class D felonies. N.Y. Penal Law Sections 110.05 (3), 160.10 and 120.05. Since felony charges were involved, jurisdiction to try the case was vested exclusively in the superior court, where the case was assigned. CPL Section 10.20 (1) (a) and 10.10 (2) (a). There, Drayton, facing a possible sentence of seven years in prison, was entitled to a jury trial. Baldwin v. New York, supra, N.Y. Penal Law Section 70.00 (2) (d). There, Drayton was convicted, by a plea of guilty to

Assault in the Third Degree, a class A misdemeanor, which was offered and accepted in satisfaction of all charges in the indictment. CPL Section 10.20 (2) (b), Penal Law Section 120.00. Consequently Drayton was not within the statutory classification drawn by CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, entitled automatically to youthful offender treatment and a six month maximum sentence, despite his meeting two of the statute's three requirements in that he was of the appropriate age and had no prior criminal convictions or youthful offender adjudications. Drayton's situation fell within the class drawn by CPL Section 720.20 (1) (a), L. 1971, c.981, Section 1, and whether he would be accorded youthful offender treatment was discretionary with the court.

The court, after reviewing Drayton's record, and the probation report, denied him youthful offender treatment, and sentenced him to noe year in prison, the maximum sentence for a class A misdemeanor. N.Y. Penal Law Section 70.15 (1).

Arthur Drayton complains that the line drawn by CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, denies him the right to equal protection of the law guaranteed by the Fourteenth Amendment. He argues that the statute and the sentencing scheme of which it is a part, in providing that convicted misdemeanants receive

different treatment at sentence depending on the court where the conviction is obtained, classifies without any rational relationship to a legitimate state purpose (3J-3M,61,64). (Drayton appears to concede as he has throughout this litigation, that the "rational basis test" provides the applicable standard by which the statute is to be judged, and not the higher standard, which is reserved for scrutinizing suspect classifications, e.g. race, and statutes which impinge on fundamental rights, e.g. the right to travel. See 3J-3M,61, 64.)

On behalf of the People of the State of New York, the District Attorney urges this court to conclude that the statute classifies reasonably in order to promote judicial efficiency, a legitimate state purpose. It is the People's contention that the statute is in fact carefully drawn to achieve this purpose.

Legislation is constitutional under the equal protection clause of the fourteen amendment if there is a rational basis for the legislative classification. Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (Upholding against equal protection and due process challenges an Oklahoma statutory scheme which made it illegal for an optician to fit, duplicate, or replace lenses for human use unless prescribed in writing by a licensed optometrist

or opthalmologist, but which exempted from regulation sellers of ready-to-wear glasses); Railway Express Agency v. New York, 336 U.S. 106 (1949) (Upholding a New York City traffic regulation against an equal portection challenge. The regulation prohibited the operation on city streets of vehicles carrying the advertising of unrelated businesses, while it permitted business vehicles to display signs advertising their own business if used in the ordinary work of the owner and not mainly for advertising purposes); Dandridge v. Williams, 397 U.S. 471 (1971) (Upholding the Maryland statute for allocation of aid to families with dependent children (AFDC) against an attack asserting its invalidity under the equal protection clause. The Maryland statute provides for a maximum allotment of aid which could not be exceeded no matter how large the welfare family); McGinnes v. Royster, 410 U.S. 263 (1973), (Upholding the old New York statutory scheme for computation of a convicted prisoner's minimum parole date against an equal protection challenge. The New York scheme permitted those on bail pending trial to count a portion of that time to reduce the time after conviction that they had to wait before they became minimally eligible for parole; but it did not allow any such credit to those who awaited trial in county jails).

In applying the rational basis test, "A statutory discrimination will not be set aside if any state of facts may reasonably be conceived to justify it." Dandridge v. Williams, supra, 397 U.S. at 485.

When viewed in the light of its legislative history, and against the background of the legislation it replaced, it becomes apparent that CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, is eminently reasonable. The statute was enacted as part of a massive revision in the youthful offender article of the CPL, a principal purpose of which was to promote judicial efficiency by streamlining the procedures for youthful offender adjudications. Thus, the classification drawn by CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, defines a group of youthful first offenders none of whom are charged with any crime more serious than a class A misdemeanor, and none of whom, by hypothesis, can be found guilty at trial of any felony. CPL Sections 10.30 (1) (a) and (b), 720.20 (1) (b), L. 1971, c.981, Section 1. Their cases are to be expeditiously processed through the judicial system without burdening the system by requiring the case to be tried before a jury. CPL Section 340.40 (7), New York State Legislative Annual, 1971, c. 981, pps. 241-143 and pps. 590-591. These youths may not receive a sentence of incarceration which exceeds six months. CPL Section 720.25 (b) (ii), L. 1971, c. 981, Section 1.

Companion portions of the legislative revision of the youthful offender article eliminated the prior law's requirement for numerous probation reports as an adjunct to prosecutions against eligible youths. "Under the [prior] Criminal Procedure Law's youthful offender structure, a court must determine whether an eligible youth shall or shall not be adjudged a youthful offender prior to the entry of a plea of guilty or not guilty to the crime charged. To make this determination, the Criminal Procedure Law permits and in many instances requires court to order a pre-pleading probation report of the youth. If the youth is convicted either as a youthful offender or as an adult, a second, updated probation report is normally necessary. If the case against the youth is ultimately dismissed or if he is acquitted of the charge, then the pre-pleading probation report was an exercise in futility and a waste of probation resources.

"By providing for the determination of youthful offender status as an incident of the sentencing process, only one probation report need be compiled and no unnecessary probation reports will be occasioned." New York State Legislative Annual, 1971, c. 981, at pps. 241-242. (Governor's Memorandum to the legislature upon submission of the proposed revision in CPL Article 720 and Section 340.40). The statute which accomplishes this more efficient allocation

of limited probation department resources by shifting the time for determining whether or not to extend youthful offender treatment from the time of pleading to the time of sentence after conviction is CPL Section 720.20 (1) (a), L. 1971, c.981, Section 1. This is the statute under which Drayton was sentenced. (Manifestly, there existed a state of facts justifying this legislative classification; and, the statute is reasonable. Dandridge v. Williams, supra, 397 U.S. at 485).

A principal factor behind New York's extensive revision of the youthful offender article of the CPL in 1971 was the decision of the Supreme Court of the Untied States in Baldwin v. New York, supra., which held that if the authorized sentence of imprisonment for an offense exceeds six months, a jury trial is required by the constitution. Prior to the enactment of L. 1971, c.981, Section 1, the CPL required that all youthful offenders tried in local criminal courts be tried without a jury. New York State Legislative Annual, 1971, c. 981, p. 242. It also authorized a term of incarceration upon conviction of the same duration as that prescribed for the underlying criminal charge. New York State Legislative Annual, 1971, c. 981, p. 242. It has been a long-standing policy of the State of New York to avoid "burdening its

courts with the necessity of jury trials in non-criminal youthful offender adjudications." New York state Legislative Annual, 1971, c. 981, p. 242. But in the wake of the Baldwin decision this policy for youths accused of class A misdemeanors which authorize incarceration in excess of six months had run afoul of the right to a jury trial.

Thus, the purpose of that portion of L. 1971, c. 981, Section 1, which is found in CPL Sections 720.20 (1) (b), 720.25 (b) (ii) and 340.40 (7), is to strike a sensible balance between the right to a jury trial and the crying need in New York for the expeditious processing of court cases by avoiding the necessity of having jury trials in a large class of cases, where the crimes involved are not exceedingly serious. New York State Legislative Annual, 1971, c.981, at pps. 242-243, and at pps. 590-591. The promotion of judicial efficiency is indisputably a legitimate state purpose.

It was reasonable of the legislature to conclude that holding a trial by jury entailed a certain amount of delay in disposing of simple cases involving less serious crimes. In this context, it should be noted that legislation whose constititonality is evaluated under the rational basis test is presumed constitutional: the burden of proof lies on the party seeking to have

the statute declared invalid. Railway Express Agency v. New York, supra, 336 U.S. at 109. In the proceedings below the defendant never offered evidence to contradict this, the implicit premise of the legislation he now attacks. In the abence of evidence in the Record demonstrating that this premise is wholly without merit, the legislature's judgment in this matter is to be accepted by the reviewing court on appeal. Railway Express Agency v. New York, supra, 336 U.S. at 109.

The classification drawn by the legislature in CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, is a reasonable one. It assures that no one accused of any crime more serious than a class A misdemeanor will automatically receive youthful offender treatment and the relively lenient sentence maximum of CPL Section 720.25 (b) (ii), L. 1971, c. 981, Section 1, while at the same time assuring that those accused of serious crimes will have the opportunity to be tried before a jury. The principal effect of the distinction drawn by the statute is to differentiate between accused felons and accused misdemeanants. (See CPL Sections 10.10 and 10.20). In light of the widespread practice of "plea bargaining", to dispose of criminal charges in this state, see e.g., Santobello v. New York, 404 U.S 257, 260 (1971), the legislature might reasonably concude that the disposition

of a charge, ultimately reached in court, might not always accurately reflect the social harm caused by the defendant's conduct. Consequently, it is was not irrational for the legislature to make the degree to which the relatively lenient youthful offender treatment is available turn, in part, on the nature of the original accusation.

As Justice Shapiro pointed out in his concurring opinion in this case: "Specifically, the different legislative treatment afforded eligible youths convicted in superior courts of a misdemeanor <u>after having been indicted for the commission of a felony</u> as contrasted with those <u>convicted of a charged misdemeanor in local criminal courts</u> may reasonably flow from a legislative intention to give recogition to the fact that persons charged with more serious crimes, felonies, must be tried in superior courts where they are entitled to a jury trial, a more cumbersome procedure likely to be accompanied by delay, whereas only persons charged with misdemeanors or petty offenses are triable in local criminal courts which, in the case of the Criminal Court of the City of New York, did not then have facilities for afford jury trials to defendants. The drawing of a line of distinction between those <u>originally</u> accused of a felony and those <u>originally</u> accused of a misdemeanor

would appear, therefore, to be a rational one, at least in the case of one who is permitted to plead down to a misdemeanor." People v. Drayton, 47 A.D. 2d 952, 957 (2nd Dept., 1975) (emphasis in the original).

There is significant authority upholding legislative distinctions based on the fact of an indictment where, as here, the classifications's consequences effect the potential term of incarceration. Thus, 18 U.S., Sections 922 (h) (1) and 924 (a), make it a federal crime, punishable by five years in prison, for anyone under indictment for a crime punishable by a term in prison exceeding one year to receive a firearm or ammunition which has been shipped in interstate commerce. In United states v. Craven, 478 F. 2d 1329 (6th Cir., 1973), cert. denied, 414 U.S. 866 (1973), reh. denied, 414 U.S. 1086 (1973), the constitutionality of that statute was upheld against an equal protection attack. First, the court noted that decisions of the Supreme Court have held that the guarantee of equal protection of the laws in the Fourteenth Amendment, which applies to the states, is a part of the guarantee of due process in the Fifth Amendment, which applies to the federal government. United States v. Craven, supra, at 1338. Then, the court held that the statute's

classification was permissible. United States v. Craven, supra at 1339-1340. The court in Craven, supra, relied in large measure on United States v. Thoresen, 428 F. 2d 654 (9th Cir. 1970), which upheld against a similar equal protection-due process attack similar legislation making it a federal crime for anyone under indictment for a crime the punishment for which exceeds one year to ship firearms or ammunition in interstate commerce. United States v. Thoresen, supra, at 661-662. Taken together, both cases hold that it is permissible for the legislature to attach significance to the fact of indnctment in fashioning punishment. (Both cases undermine the reasoning of People v. Bryan R., 78 Misc. 2d 616 (Sup. Ct.; 1974), aff'd 47 A.D. 2d 599 (1st Dept. 1975), which held another section of the youthful offender article unconstitutional on the theory that it was unreasonable for the indictment to have consequences which lingered after, and were unrelated to, conviction.) See also, Jeffery v. Malcolm, 353 F. Supp., 395 (S.D.N.Y., 1973) (Upholding against an equal protection attack a New York scheme which permitted convicted felons to accumulate a good time credit amounting to a significantly larger fraction of their sentences than could convicted misdemeanants).

Quinones v. United States, 516 F. 2d 1309 (1st Cir. 1975), cert. denied, 423 U.S. 852 (1975) upheld that constitutionality of 18 U.S.C. Section 5032 which provides that youths charged with crimes punishable by death or life imnprisonment can not be prosecuted as juvenile delinquents. Another portion of 18 U.S.C. § 5032 provides that even youths accused of lesser crimes are to be tried as adults if the Attorney General expressly directs it. Its constitutionality was upheld in Cox v. United States, 473 F. 2d 334 (4th Cir. 1973), cert. denied, 414 U.S. 869 (1974). If the Attorney General can route an accused away from the federal juvenile court, then the New York grand jury ought to be able to route an otherwise eligible youth away from automatic youthful offender treatment.

Congress has enacted a statute for the District of Columbia which precludes juvenile treatment for those sixteen or more and charged by the United States Attorney of certain (mostly violent) crimes, while making juvenile treatment generally available to those under eighteen. 16 D.C. Code Section 2301 (3) (A) (Supp. IV, 1971). Those charged with the designated offenses remain ineligible for juvenile treatment even if convicted by plea or verdict of a lesser included offense. 16 D.C. Code Section 2301 (3) (B) (Supp IV.,1971). This statute was upheld in United States v.Bland, 472 F. 2d 1329 (D.C. Cir. 1973), cert. denied, 412 U.S. 909 (1975). If the constitution permits

Congress to allow the United States Attorney, and the grand juries from which he must secure his indictments, to route a youth away from juvenile court, then it permits New York to allow its grand juries to route an accused away from automatic youthful offender treatment. (The district court's attempt to distinguish Bland, supra, on the ground that it concerns a statute which affects the proceedings in toto, proves too much (159). The proceedings would be affected in toto if CPL § 720.20 (1) (a), L. 1971, c.981, § 1, precluded youthful offender treatment for those accused in superior courts. By what logic can it be said to be more irrational than 16 D.C. Code Section 2301 (3) (A) and (B) (Supp IV, 1971) because it is less harsh?)

Thus, since the statute, CPL Section 720.20 (1) (b), L. 971, c. 981, Section 1, represents a reasonable legislative choice to achieve a legitimate legislative purpose, its constitutionality should be upheld. "...Our decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which is subordinate. Rather, legislative solutions must be respected if the distinctions drawn have some basis in practical experience.... or if some legitimate state interest is advanced....Permitting nullification of statutory classifications based rationally on a non-primary legislative purpose would allow courts to peruse legislative proceedings for subtle emphasis

supporting subjective impressions and preferences. The Equal Protection Clause does not countenance such speculative probing into the purpose of a co-ordinate branch," wrote Mr. Justice Powell in McGinnie v. Royster, supra, 410 U.S. 276-277. Thus, the legislation must be upheld even if judicial efficiency were not its primary purpose. All that is necessary is that the promotion of judicial efficiency be a purpose, and that the statute be rationally related to achieving that purpose. It is not necessary for the Court to agree that the legislation is wise to uphold its constitutionality; "the Fourteenth Amendment gives the ... courts no power to impose upon the States their views of what constitutes wise... social policy." Dandridge v. Williams, supra, 397 U.S. 471,486 (1970).

What the district court has done in this case is substitute its judgment for that of the legislature as to what is wise social policy. It has disregarded the teaching of our highest court on the approach courts should take in evaluating legislation under the fourteenth amendment. See McGinnis v. Royster, supra. Drayton's position throughout this lengthy litigation has been that, once the State enacts an ameliorative program (here a system for relieving some youths from the stigma of a criminal record), it must do so with legislation which

in every particular advances only the predominant purpose of the program without regard for any other value. This is the approach the district court took in ruling CPL Section 720.20 (1) (a), L. 1971, c. 981, Section 1, unconstitutional as applied to Drayton. It ignores that the law, as life, is multi-valued. Drayton seeks, as did the defendant in Quinones, supra, to have the court supplant the legislature. Just as the First Circuit rejected that request in Quinones, supra, so should the Second Circuit in this case.

Indeed it is worthy of note how well this statute does achieve its purpose. The inclusion in the mandatory youthful offender category of CPL Section 720.20 (1) (b) , L. 1971, c. 981, Section 1 of those eligible youths ultimately convicted in the Supreme Court of no crime more serious than a misdemeanor would not promote the statutory purpose of avoiding time-consuming jury trials. For the situation could only arise in one of three ways: One, the defendant was entitled to a jury trial, exercised his right, and was convicted, in which case inclusion under the mandatory sentencing provisions would be useless, since the purpose of the statute would have already been defeated. Two, the defendant was entitled to a jury trial, but chose to waive the right, in which case inclusion in the statutory scheme is unnecessary to achieve the

statutory purpose. Third, the defendant was indicted for a lesser misdemeanor, the possible punishment for which is not sufficiently severe to entitle him to a jury trial, in which case inclusion in the statutory scheme is again unnecessary to achieve the legislative purpose. Drayton's situation falls in the category "Two," above, since he waived his right to a jury trial when he pleaded guilty. His case was in the Supreme Court because he had been indicted for felonies. Thus, the defendant complains of his exclusion from a classification CPL Section 720.20 (1) (b), L. 1971, C.981, Section 1, which receives a benefit denied him (automatic youthful offender treatment). But he ignores that that class is under a disability (trial without a jury) which he did not face. His argument ignores the guid pro quo invovled in the statutory scheme. Compare, Carter v. United States, 306 F. 2d 283 (D.C. Cir. 1962). (Upholding the constitutionality of the Youth Corrections Act, 18 U.S.C. Section 5010 (b) (1958), which in some circumstances permitted a youth to be incarcerated for a longer time than an adult could be for the same crime. That the confinement was to be in special rehabilitative facilities constituted a guid pro quo, which justified the potentially longer restriction on liberty.)

Indeed, there are some hard cases one can imagine under this statute: a defendant whose case was in a superior court becuase he was indicted for a class A or B misdemeanor; or a defendant who went to trial on an indictment accusing him of felonies, and was convicted of a misdemeanor only. Both situtions are distinguishable from that involved in this appeal, where Drayton was convicted by a plea of guilty, and perhaps ought to be left for another day. As the New York Court of Appeals held in this case, Drayton does not have the standing to raise whatever claim may be involved in either situation. People v. Drayton, 39 N.Y. 2d 580, 585 (1976). Still, it should be recalled that we do not deal with a statute which precludes youthful offender treatment, if the conviction is in a superior court; rather, it merely makes youthful offender treatment discretionary with the sentencing judge. CPL Section 720.20 (1) (a), L. 1971, c. 981, Section 1. Adminstrative convinence justifies the drawing of some fine distinctions. Compare, Marshall v. United States, 414 U.S. 417, (1974). (Upholding against equal protection and due process challenges the two felony exclusion provision of the narcotics Addict Rehabilitation Act 18 U.S.C. Section 4251 (f) (4). The Court noted that the line might as well have been drawn at one prior

conviction, or three.) Legislation need not be drawn with geometric precision to be consistent with the Fourteenth Amendment. Williamson v. Lee Optical, supra., 348 U.S. at 489.

Drayton's suggestion that the classification drawn by CPL section 720.20 (1) (a), L. 1971, c. 981, Section 1, negates the presumption of innocence is farfetched (78-79). We deal in this case with a sentencing statute. By definition it applies only to those convicted, either by plea or verdict.

[Statutes which make eligibility for lenient treatment accorded youths depend in part on the crime charged are hardly novel. In addition to the federal statutes already cited there are: CPL Section 720.10 (2) (youths accused of certain class A felonies ineligible for youthful offender treatment); 1973 Col. Rev. State Section 19-103 (9) (b) (II) (similar); 10 Del. Code Ann. (1974 Rev.) Section 938 (a) (1) (juvenile court not available for those accused of murder, rape, or kidnaping); Burns Ind. Stats, (Code Ed.) Sections 31-5-7-4.1 (a) (1) and 31-5-7-13 (same, if murder charged); Iowa Code Ann. Sections 232.64 and 232.73 (eligible juvenile to be transferred to superior court for trial as an adult if charge is an indictable offense); La Const. Art VII, Section 52 (no juvenile court jurisdiction if charge is a capital

crime or aggravated rape and youth is over 15); Ann. Code of Md. Art 26 Sections 70-2 (d) and 70-16 (a) (same for those over 14 charged with capital crimes; or 16 or more, charged wtih robbery with a deadly weapon); Miss. Code Ann. Sections 7185-03 and 7185-15 (similar for capital charges; also if charges carry life sentene or if offenses against the public order are charged); Nev. Rev. Stats. Sections 62.050 and 62.070 (same, for capital offenses; and, if a felony charged court may foreward case for trial of defendant as an adult). That so many states have found such classifications in order suggests something other than irrational and arbitrary action.]

Drayton, both in the state courts and in the district court makes much of a remark by the Assistant District Attorney in the trial part, when his plea of guilty was entered, to the effect that Drayton should never have been indicted for the felonies of Attempted Robbery in the Second Degree and Assault in the Second Degree. It should be noted that while Assistant District Attorneys have much power, they do not have the authority to dismiss an indictment; that is a judicial act. The Assistant District Attorney's remark in this case did not nullify the grand jury's decision to indict for felonies. Neither the District Attorney nor the defense counsel

moved to dismiss the indictment or reduce its charges. Nor did the court take any such action on its own motion. The integrity of the Grand Jury's decision still stands, unimpaired by any judical determination of the indictment's insufficiency. (Of course, the defendant's plea "disposed of" the indictment, CPL Section 220.30 (2). But it did not negate it. Were the defendant successfully to move to withdraw his guilty plea, he would face trial on all the charges contained in the indictment at the time the plea was offered. CPL Section 440.10 (7). And the remark of the Assistant District Attorney who accepted the plea would not prevent the District Attorney from trying the case, since no one is bound by representations of his agents beyond both their actual and their apparent authority.) This defendant was tried in Supreme Court because of the grand jury's decision to indict him for felonies. In this sense the indictment remains a significant aspect of this case.

The fact is that Drayton faced a possible prison sentence of seven years. He pleaded guilty to a class A misdemeanor. The offered plea would satisfy the charges in the indictment only if accepted by the court and the people. CPL Sections 220.10 (4) and 220.30 (3). Drayton must have thought the plea was a pretty good deal at the time or he would not have taken it.

As Justice Shapiro observed in his concurring opinion in the Appellate Division in this case: "[Drayton] ...attacks the classification set up by the Legislature in distinguishing between eligible youths who must receive youthful offender treatment and those who can be denied such treatment in the discretion of the court on the ground that, since it rests on whether the eligible youth has been indicted for a felony or simply charged with a misdemeanor, it allows the punishment imposable upon conviction to rest on the nature of an unproved charge. But this ignores the fact that it is the charge that determines in which court the defendant will be tried and its differing impact on the administration of justice. It also ignores the fact that an unproved charge may, under certain circumstances, and when considered in connection with the results of the presentence investigation, be indicative of the extent and seriousness of the improper conduct of the defendant, and thereby give some indication of whether he should be given the benifit of youthful offender treatment." People v. Drayton, 47 A.D. 2d 952, 958 (2d Dept. 1975).

Fourteen judges have passed on Drayton's claim. Thirteen of them have found the statute in issue permissable under the Fourteenth Amendment. This court ought to join the weight of considered judgment in this case, and hold the statute constitutional.

CONCLUSION

THE JUDGMENT AND ORDER OF THE DISTRICT COURT SHOULD BE REVERSED, AND THE CASE REMANDED WITH DIRECTIONS TO VACATE THE WRIT.

Dated: Brooklyn, New York
February, 1977

Respectfully submitted,

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Brief + separately bound appendix

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